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NOV 27 2018

OPEN RECORDS DIVISION

GOVERNOR GREG ABBOTT

November 27, 2018

Justin Gordon
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Open Records Letter Ruling Request
OAG ID#: 747843
OOG ID#: 405-18, 428-18, 429-18

Dear Mr. Gordon:

On November 1, 2018, the Office of the Governor (the "OOG") received a request under the Public Information Act (the "PIA") from Ms. Jamie Corey. A copy of the request is attached as Exhibit A.¹ Pursuant to section 552.301(a), the OOG timely requested a decision from your office on whether the responsive information is excepted from disclosure under the PIA. That request is attached as Exhibit C. Subsequently, on November 15, 2018, the requestor made two additional requests; any information responsive to those requests is also responsive to OOG ID# 405-18. Those requests are also attached in Exhibit A. Accordingly, the OOG requests the Office of the Attorney General consider those requests in OAG-ID# 747843. Our office now submits this brief in accordance with sections 552.301(b) and 552.301(e).

The OOG asserts portions of the responsive information are excepted from required public disclosure under sections 552.107 and 552.111 of the PIA. A representative sample of this information is attached as Exhibit B. The OOG has copied the requestor as a recipient of this brief pursuant to sections 552.301(d) and 552.301(e-1).

I. Information Excepted From Required Public Disclosure Under Section 552.107: Privileged Attorney-Client Communications

The OOG asserts that some of the information within Exhibit B consists of privileged attorney-client communications. Section 552.107(1) of the Government Code excepts from required public disclosure information "that the attorney general . . . is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules

¹ The OOG observed a skeleton crew day for half a day and was closed at noon on November 21, 2018. The OOG was closed on November 22, 2018, and November 23, 2018.

of Professional Conduct.” Tex. Gov’t Code § 552.107. Section 552.107 protects information that falls within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Tex. Att’y Gen. ORD-676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. Tex. R. Evid. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *Id.* 503(b)(1)(A), (B), (C), (D), (E). Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Section 552.107(1) applies to communications between a governmental body and its attorney made in confidence to further the attorney’s rendering of professional legal services to the governmental body. Attorney General opinions applying section 552.107(1) have permitted governmental bodies to withhold information their attorneys have received or generated in the capacity of a legal advisor. *See* Tex. Att’y Gen. ORD-462 at 10-11 (1987) (applying section 3(a)(7), predecessor to Section 552.107(1)). Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The information marked within Exhibit B includes communications between an OOG attorney and OOG staff on various legal matters. The marked information constitutes or reveals communications between privileged parties that were made for the purpose of providing professional legal services to the OOG. Further, these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. *See* Tex. R. Evid. 503(a)(5). Therefore, the OOG contends the marked information within Exhibit B may be withheld under section 552.107(1) of the Government Code.

II. Information Excepted From Required Public Disclosure Under Section 552.111: Deliberative Process Privilege

Section 552.111 of the Government Code excepts from required public disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Tex. Gov’t Code § 552.111. Your office has construed section 552.111 to encompass the deliberative process privilege by excepting from disclosure internal communications consisting of advice, recommendations, or opinions reflecting the policy making processes of a governmental body. Tex. Att’y Gen. ORD-615 at 5 (1993); *accord City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 556 (Tex. App.—Dallas 1998) (“Section 552.111 . . . excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policy-making processes of the governmental body at issue.”), *affirmed*, 22 S.W.3d 351 (Tex. 2000). But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the

factual information also may be withheld under section 552.111. *See* Tex. Att’y Gen. ORD-313 at 3 (1982). The purpose of section 552.111 is “to protect advice and opinions on policy matters and to encourage frank and open discussion within an agency in connection with its decision-making processes.” *Dallas Morning News*, 969 S.W.2d at 556. Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Tex. Att’y Gen. ORD-561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process).

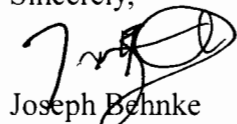
Your office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Tex. Att’y Gen. ORD-559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

The information marked within Exhibit B includes such privileged communications and drafts. First, the information includes communications and information underlying communications between OOG staff and officials acting in their official policy-making capacities. Additionally, the information relates to preliminary drafts circulated between OOG staff and officials, acting in their official policy-making capacities. These drafts are intended for public release in their final form. Moreover, these drafts reflect the drafter’s advice, opinions, and recommendations with regard to the form and content of the final document. Thus, the OOG asserts that the marked information within Exhibit B is excepted from disclosure under section 552.111 of the Government Code and the deliberative process privilege.

III. Conclusion

On behalf of the OOG and pursuant to section 552.301 of the Government Code, I respectfully request an open records letter ruling as to the applicability of the above raised exceptions. If you have any questions or need additional information, please contact me at (512) 463-1750.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Behnke", written over a horizontal line.

Joseph Behnke
Assistant General Counsel
Office of Governor Greg Abbott

cc: Jamie Corey
DEPT MR 63208 411A Highland Ave
600 Travis Street
Somerville, MA 02144-2516
VIA EMAIL ONLY

EXHIBIT A

From: 63208-28783855@requests.muckrock.com
Sent: Thursday, November 1, 2018 4:52 PM
To: Public Records
Subject: Texas Public Information Act Request: CAFE Standards (Office of the Governor)

Office of the Governor
Texas Public Information Act Office
P.O. Box 12428
Austin, TX 78711

November 1, 2018

To Whom It May Concern:

Pursuant to the Texas Public Information Act, I hereby request the following records:

Electronic communications containing the following keywords:

"Corporate Average Fuel Economy"
"CAFE"
"CAFE Standards"
"Greenhouse Gas Emission Standards"
"Safer Affordable Fuel-Efficient Vehicles Rule"
"SAFE Rule"

The scope of this request includes the Governor, the Governor's scheduler and/or executive assistant, the Governor's Chief of Staff, the Governor's Washington Representative, the Governor's Communications Director and any other individual within the Office of the Governor that works on CAFE standard issues.

The search for records should include but is not limited to emails, attachments, both sent and received, all draft records, notes, minutes, scheduling records, text messages and any other electronic correspondence (internal and external) containing the keywords. The search for records may be limited to those sent and received between August 2, 2018 and the date of your final response. Please note that this request includes all emails sent and received on official state email accounts, as well as any other email accounts, including personal email accounts, that have been used for official business.

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 10 business days, as the statute requires.

Sincerely,

Jamie Corey

Filed via MuckRock.com
E-mail (Preferred): 63208-28783855@requests.muckrock.com

Upload documents directly: https://www.muckrock.com/accounts/agency_login/office-governor-3877/cafe-standards-office-of-the-governor-63208/?uuid-login=ffdbe5c2-c5c2-4330-8edb-bde66250fb57&email=publicrecords%40governor.state.tx.us#agency-reply

Is this email coming to the wrong contact? Something else wrong? Use the above link to let us know.

For mailed responses, please address (see note):

MuckRock News

DEPT MR 63208

411A Highland Ave

Somerville, MA 02144-2516

PLEASE NOTE: This request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above in order to better track, share, and manage public records requests. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

From: Jamie Corey <jamie@documented.net>
Sent: Thursday, November 15, 2018 8:11 AM
To: Public Records
Subject: 428-18 Corey Public Records Request (Hambrick 1 of 2)

Dear Records Officer,

Pursuant to the Texas Public Information Act, we are requesting all records in the possession of Wes Hambrick that relate to a letter on the federal Safer Affordable Fuel Efficient (SAFE) Vehicles proposed rule.

According to recent email correspondence obtained through an open records request in another state, Mr. Hambrick conducted official business using the email "wes.hambrick@gmail.com" to coordinate a sign-on letter related to the proposed SAFE rule with other Governors.

Please note this request should include all emails sent and received on official state email accounts, as well as any other email accounts, including "wes.hambrick@gmail.com," that have been used for official business.

The search for records may be limited to those sent and received between July 1, 2018 and the date of your final response.

The requested documents will be made available to the general public, and this request is not being made for commercial purposes. In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you for your assistance with this request.

Sincerely,
Jamie Corey
jamie@documented.net
PO Box 258084
Madison, WI 53725
608-208-5851

From: Jamie Corey <jamie@documented.net>
Sent: Thursday, November 15, 2018 8:11 AM
To: Public Records
Subject: 429-18 Corey Public Records Request (Hambrick 2 of 2)

Dear Records Officer,

Pursuant to the Texas Public Information Act, we are requesting all communications between Wes Hambrick, including immediate assistants and/or scheduling staff, and the American Fuel & Petrochemical Manufacturers (also known as "AFPM").

According to recent email correspondence obtained through an open records request in another state, Mr. Hambrick conducted official business using the email "wes.hambrick@gmail.com" to coordinate a sign-on letter with other Governors. Please note this request should include all emails sent and received on official state email accounts, as well as any other email accounts, including "wes.hambrick@gmail.com," that have been used for official business.

The search for records may be limited to those sent and received between July 1, 2018 and the date of your final response.

For the electronic communications portion of the search, please use email addresses that contain the domain: @afpm.org

The requested documents will be made available to the general public, and this request is not being made for commercial purposes. In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you for your assistance with this request.

Sincerely,
Jamie Corey
jamie@documented.net
PO Box 258084
Madison, WI 53725
608-208-5851

EXHIBIT C



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OPEN RECORDS DIVISION

GOVERNOR GREG ABBOTT

November 15, 2018

Justin Gordon
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Open Records Letter Ruling Request
OOG ID#: 405-18

Dear Mr. Gordon:

On November 1, 2018, the Office of the Governor (the "OOG") received a clarified request under the Public Information Act (the "PIA") from Mr. Jamie Corey. A copy of the request is attached as Exhibit A.

The OOG asserts information responsive to this request is excepted from disclosure under the Public Information Act ("PIA"). Specifically, the OOG invokes all of the exceptions provided by, and the exceptions incorporated into, sections 552.101 through 552.158 of the PIA.

Pursuant to section 552.301(a) of the PIA, this letter is submitted in order to seek a decision as to whether the exceptions apply. To assist in your review, the OOG will provide written comments and the responsive documents, or a representative sample of the responsive documents, not later than the 15th business day from the date the request was received.

Should you need additional information, please feel free to contact me at 512-463-1750 or via email at publicrecords@gov.texas.gov.

Sincerely,

Joseph Behnke
Public Information Coordinator
Assistant General Counsel
Office of Governor Greg Abbott

cc: Jamie Corey
DEPT MR 63208 411A Highland Ave
600 Travis Street
Somerville, MA 02144-2516
VIA EMAIL ONLY

Johanna Meade

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Subject: Texas Public Information Act Request: CAFE Standards (Office of the Governor)

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Sincerely,

Jamie Corey

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E-mail (Preferred): 63208-28783855@requests.muckrock.com

Upload documents directly: https://www.muckrock.com/accounts/agency_login/office-governor-3877/caf -standards-office-of-the-governor-63208/?uuid-login=ffdbe5c2-c5c2-4330-8edb-bde66250fb57&email=publicrecords%40governor.state.tx.us#agency-reply
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